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IN THE

Supreme Court of the United States

October Term, 1940

No. 741

KLAXON COMPANY

Petitioner

v.

STENTOR ELECTRIC MANUFACTURING COMPANY, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR STENTOR ELECTRIC MANUFACTURING COMPANY, INC., IN OPPOSITION

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Counsel for Stentor Electric Manufacturing Company, Inc.

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BRIEF FOR STENTOR ELECTRIC MANUFACTURING COMPANY, INC., IN OPPOSITION

Opinions Below

The petition herein omits to mention, among the opinions below, the opinion of the District Court holding that the plaintiff, Stentor Electric Manufacturing Company, Inc., has the capacity to sue. This opinion is printed Apt. App. 12-14, and is reported at 23 Fed. Supp. 351.

The other opinions below are as listed in the petition, to-wit: (1) opinion of the District Court refusing to set aside the verdict of the jury in favor of the plaintiff or to

order a new trial, and awarding interest upon the verdict (Apt. App. 45-67, reported 30 Fed. Supp. 425); and (2) opinion of the Circuit Court of Appeals affirming the judgment in favor of the plaintiff (reported 115 Fed. (2d) 268).

Questions Presented

The statement of "Questions Presented" at p. 2 of the petition is based upon partial and incomplete reference to the facts and the Record, and is misleading. We have therefore restated those questions, as follows:

1. Whether, in an action (instituted by reason of diversity of citizenship in the District Court of Delaware) for breach of a contract made and to be performed in New York, the Court was right in adding interest to the verdict of the jury as provided by New York law?

2. Whether the plaintiff, a New York corporation dissolved under a statute which preserves its existence and its right to sue and its liability to be sued without limitation as to time and "until its business and affairs are fully adjusted and wound up," has the capacity to sue in a Federal Court for breach of a contract made prior to its dissolution?

3. Whether, on the trial of an action for damages for breach of a contract under which the plaintiff sold a going business to the defendant upon the defendant's promise to promote and expand the business and to pay the plaintiff, as the plaintiff's compensation, a share in the future profits of the business, wherein the plaintiff proved damages by showing past profits, profit-earning capacity, and rates of profit and markets available, it was error, after the defendant had opened the door upon cross-examination, to admit proof of estimated future profits based upon the

foregoing and also based upon census figures of potential markets in the industry during the years in suit?

Statutes Involved

In respect of the addition of interest to the verdict, the applicable statutory provision is Section 480 of the New York Civil Practice Act, printed at p. 20 of the petition herein.

In respect of the plaintiff's capacity to sue, the applicable statutory provision is former Section 221 of the New York General Corporation Law, printed at pp. 17-20 of the petition herein.

Statement

Plaintiff sued upon a contract under seal made with defendant May 20, 1918.

The contract was negotiated, executed and delivered in New York (Apt. App. 58-9), and "fixes New York as the place of performance" (115 Fed. (2d) at p. 276).

Under the contract the plaintiff transferred to the defendant its entire business as a going concern, including unfilled orders, outstanding receivables, and all of plaintiff's tangible property. The plaintiff owned patents which had until September 29, 1931 to run; the contract gave the defendant a license to manufacture and sell under the said patents until their expiration, the defendant on its part agreeing that it "will use its best efforts to further the manufacture and sale of the articles covered by this agreement, and to that end it will maintain an efficient organization for the manufacture and sale of said articles" (Ex. P-9, Art. 13th, printed Apt. App. 296-7). The contract gave the plaintiff a one-half share in the profits of the enterprise; it was a contract "upon a profit-sharing basis" (Apt. App. 48).

On May 26, 1919, plaintiff voluntarily dissolved under the provisions of the New York General Corporation Law referred to above. The parties continued to treat the contract as a subsisting and mutually binding obligation until its expiry date, namely, September 29, 1931.

The suit at bar was instituted by the plaintiff on June 1, 1929, to recover damages for violation by the defendant of its aforesaid covenant to use its best efforts. To the plaintiff's declaration defendant filed a plea in abatement challenging the plaintiff's capacity to sue on the ground of its dissolution in 1919. Plaintiff demurred to the plea in abatement. The demurrer was sustained (Apt. App. 12-14; 23 Fed. Supp. 351).

The trial was had in June, 1939. The jury found for the plaintiff in the sum of $100,000. The proof of damages is not fairly stated in the petition herein. It included, as shown in the opinions below (Apt. App. 48-52; 115 Fed. (2d) at pp. 273-5), proof of the plaintiff's past profits; proof of the defendant's profits upon unfilled orders which the plaintiff turned over to the defendant under the contract in suit; proof of profits of which the defendant deprived the plaintiff by a practice of price-favoritism toward the defendant's fellow-affiliates of General Motors Corporation; and proof of the markets which were available to the defendant and the rates of profit which could be earned upon the product.

The amended complaint, upon which the case was tried, prayed damages, interest and costs (Apt. App. 22). No issue in respect of interest was submitted to the jury. After verdict, following the New York statute, the plaintiff moved for allowance of interest upon the verdict from the date of commencement of suit to the date of verdict, and this motion was granted (Apt. App. 57-67; 30 Fed. Supp. at pp. 431-5).

The Circuit Court of Appeals affirmed the judgment in plaintiff's favor (115 Fed. (2d) 268), and denied rehearing.

ARGUMENT

FIRST POINT

(Answering Points I, II and III of the Petition, pp. 6-11)

It is everywhere settled that the right to interest as part of the damages for breach of contract is governed by the law of the place of the making and performance of the contract. There is no conflict among the Circuit Courts of Appeals on this question; and the other grounds for *certiorari* on this issue, urged in the petition herein, are also without merit.

1

The defendant does not deny that the Courts below have correctly construed Section 480 of the New York Civil Practice Act, following the New York cases, as follows (Apt. App. 59):

> "These cases hold the statute gives an absolute right as a matter of law to interest as a part of the damages for breach of contract, whether the damages were liquidated or unliquidated. The addition of interest is mandatory. Interest is not required to be a part of the verdict but is computed and added by the court to the principal sum awarded by the verdict. In the absence of proof of a fixed date of breach, interest is computed and added from the date of commencement of the action. *Manufacturers Trust Co.* v. *Gray*, 278 N. Y. 380, 387; *McLoughlin* v. *Brinckerhoff*, 222 App. Div. 458; *Quinn* v. *Sigretto*, 229 App. Div. 727; *Freedman* v. *Hart & Early Co.*, 162 Misc. 487; *Aronowsky* v. *Goldberger-Raabin Co.*, 250 App. Div. 731; *United States* v. *Stephanidis*, 41 F. (2d) 960."

If, therefore, the case at bar had been tried in New York, no question could be raised as to the propriety of the Court's action in adding interest to the verdict (cases

supra, and also: *Funkhouser* v. *J. B. Preston Company,* 290 U. S. 163). The sole contention is that the New York statute is not applicable to the case at bar, because it was tried in Delaware.

2

But the fact that the case was tried in Delaware makes no difference in the plaintiff's rights, because the right to moratory interest upon a breach of contract is governed by the law of the place of the making and performance of the contract. In *Illinois Surety Company* v. *John Davis Co.,* 244 U. S. 376, 381, this Court said:

> "The contract and bond were made in Illinois and were to be performed there. Questions of liability for interest must therefore be determined by the law of that state. * * * *"

Damages are concededly of the substance of the right (*Dyke* v. *Erie R. R. Co.,* 45 N. Y. 113, 118); and so, too, "the *measure* of damages must be a part of the *right* to damages," and is of the substance also (2 *Beale, Conflict of Laws,* Section 412.1). Interest, as a part of the damages, is therefore held by uniform authority to be of the substance of the right, and as such, the right to interest has always been held to be governed by the law of the place where the right was created—in contract, the law of place of contract; in tort, the law of the place where the tort was committed (*Northern Pacific R. Co.* v. *Babcock,* 154 U. S. 190, at 197-9; *Freygang* v. *Vera Cruz & P. R. Co.* (4th C. C. A.), 154 Fed. 640; *Wynne* v. *McCarthy* (10th C. C. A.), 97 Fed. (2d) 964, 970; *Bell* v. *Lamborn* (4th C. C. A.), 2 Fed. (2d) 205; *Curtis* v. *Campbell* (3rd C. C. A.), 76 Fed. (2d) 84; *Globe Indemnity Co.* v. *Southern Pac. Co.* (2nd C. C. A.), 30 Fed. (2d) 580, 583; *Goodrich, Conflict of Laws,* p. 232).

The above rule has been applied in Delaware (*United States* v. *Garland,* 271 Fed. 14). It is the Delaware rule (*Mackenzie* v. *Omar,* 34 Del. 435, 457):

> "As we are considering a Texas contract, and the above rule as to the measure of damages applies in that state, we are bound by that rule, and it is unnecessary for us to consider the soundness of the principle on which it is based. *Williams* v. *Beltz, et al.,* 6 Boyce 554, 101 A. 905; *Id.,* 7 *Boyce* 360, 107 A. 298; *Northern Pac. R. R. Co.* v. *Babcock,* 154 U. S. 190, 14 *S. Ct.* 978, 38 *L. Ed.* 958; *Sandham* v. *Grounds* (C. C. A.), 94 F. 83; *Atwood* v. *Walker,* 179 *Mass.* 514, 61 N. E. 58; 17 C. J. 719."

Mackenzie v. *Omar* was affirmed by the Supreme Court *sub nom Phoenix* v. *Mackenzie,* 34 Del. 460, where it was said, page 469:

> "There is one important fact that is not and cannot be disputed, viz: That the contract involved was made in the State of Texas and is governed by the law of that State. * * *"

The Supreme Court, in its affirmance, applied the above rule to the issues of damages and interest involved in the case (see headnotes 15, 16, 34 Del. at pp. 479-80).

In the more recent case of *Canadian Industrial Alcohol Company, Ltd.* v. *Nelson,* 38 Del. 26, 58, the Delaware Supreme Court wrote that "the obligation to pay damages for the non-performance of a contract is a matter of substantive right, imposed by the law as a substitute for performance, and should, therefore, be measured by the law of the place where such performance was promised. *Goodrich on the Conflict of Laws* 183; *Wharton on the Conflict of Laws* 928, 929."

So, too, the highest Court of New York has expressly held that interest is as much of the substance as the right to damages itself (*Loucks* v. *Standard Oil Co.,* 224 N. Y.

99, 109; *Kiefer* v. *Grand Trunk Ry. Co.*, 12 N. Y. App. Div. 28, aff'd 153 N. Y. 688).

Under *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, there is and can be no Federal rule with respect to interest in such a case as the one at bar. The Courts below were therefore right in applying the substantive law of New York in conformity with the conflict of laws rule of Delaware upon the subject.

3

There is no divergent rule or conflict in the Federal cases on this proposition, and the cases cited in the petition, pp. 6-11, show no such conflict.

In *Mather* v. *Stokely* (1st C. C. A.), 218 Fed. 764, and *Butte A. & P. Ry. Co.* v. *United States* (9th C. C. A.), 61 Fed. (2d) 587, the only question bearing upon interest was whether interest should be added to the jury's verdict at the *rate* fixed by the law of the forum or at the *rate* fixed by the law of the place of contract The question of *rate of interest* is not presented by the case at bar, since both the law of the forum, Delaware, and the law of the place of contract, New York, have the same legal rate of interest, *i. e.*, 6% per annum (N. Y. Cons. L. [Cahill 1930] Chap. 21, § 370, and Delaware Rev. Code [1935] § 3101).

In *Jones* v. *Foster* (4th C. C. A.), 70 Fed. (2d) 200, cited at p. 7 of the petition, the suit was upon a Virginia contract. Section 6259 of the Virginia Code provided that "In any action whether on contract or for tort, *the jury* may allow interest on the sum found by the verdict, or any part thereof, and fix the period at which the interest shall commence." The jury brought in a verdict with respect to which they said, in response to the District Judge's inquiry, that "they had not considered the matter of interest." The Judge thereupon amended the verdict so as to

add interest. Comformably to the Virginia cases which construe the above statute, the Circuit Court of Appeals concluded "that *the jury* should have been instructed in this case that interest was to be allowed or not *in their discretion.*" But in the case at bar no such question is presented, since under the New York statute and the cases construing it, the addition of interest is mandatory, and "Plaintiff being entitled to interest as a matter of law there is no issue of fact as to interest to be submitted to the jury" (Apt. App. 59).

In *Companhia de Navegacao Lloyd* v. *Blake Co.* (2nd C. C. A.), 34 Fed. (2d) 616, cited at p. 9 of the petition, the contract, as we have ascertained from an examination of the Record in that case, was made in Brazil. No reference was made by either side in their briefs in that case to Section 480 of the New York Civil Practice Act, nor is Section 480 mentioned anywhere in the opinion. In view of the fact that Brazil, and not New York, was the place of contract, it was obviously assumed by both sides as well as by the Court—and correctly so—that Section 480 had no reference to the rights of the parties. In a later case in the Federal court in New York, where a New York contract was in suit and the question of the Court's right to add interest after verdict was therefore in issue, Section 480 was applied and the interest was added (*United States* v. *Stephanidis et al.*, 41 Fed. (2d) 960).

4

Defendant further urges that this Court in *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163, held that Section 480 of the New York Civil Practice Act was a statute regulating procedure only. This Court did not so hold. It held that Section 480 "concerns the *remedy.*" The defendant's argument is based upon the fallacious assumption that this Court was using the word "remedy" in the same sense as

"procedure"—a mistake which this Court warned against as far back as *Central Vermont R. Co.* v. *White,* 238 U. S. 507, 511, where it pointed out that "matters of substance and procedure must not be confounded, because they happen to have the same name." The opinion of the New York Court of Appeals (*Preston Co.* v. *Funkhouser,* 261 N. Y. 140), and the opinion of this Court, both show that the defendant's argument is untenable.

The contract in the *Funkhouser* case was entered into before enactment of Section 480. The suit was for damages for breach. The damages were unliquidated. There was no provision in the contract for moratory interest. The verdict of the jury was in favor of the plaintiff for $45,889.70. After verdict, acting under Section 480, the Court added interest of $14,417.51. The defendant was contending that Section 480, in its retroactive application, was unconstitutional on the ground that it impaired the obligation of the contract.

This Court upheld the constitutionality of Section 480 and held that the application of the said section to a contract made prior to its passage did not impair the obligation thereof. In so holding, both the Court of Appeals and this Court found that no existing contractual rights between the parties were diminished or increased, because under New York law there was an obligation to pay interest as part of the damages for breach even before the enactment of Section 480, so that the sole effect of the statute was to give a more efficient remedy for the enforcement of the said pre-existing obligation. Chief Justice POUND wrote for the Court of Appeals that "the obligation of the contract includes interest" and that Section 480 in allowing the recovery of interest, "vindicates a preexisting right to compensation for breach of contract," and further said that the section "prevents an escape through procedural difficulties from the real obligation to make full compensation for breach of contract." The

present Chief Justice wrote for this Court that "The decisive point in the instant case is that the provision for the enlarged remedy was consistent with the substantial rights of the parties under their contract," and that "the statute in question concerns the remedy and does not disturb the obligations of the contract."

5

The reference to Section 966 of the U. S. Revised Statutes, appearing at p. 12 of the petition, is wholly without point. Section 966 provides for interest on judgments, and has nothing to do with the allowance of interest as part of damages.

Massachusetts Benefit Ass'n v. *Miles*, 137 U. S. 689, cited at p. 12 of the petition, did not have to do with interest as damages for breach of contract. It had only to do with interest between the date of verdict and the date of entry of judgment.

SECOND POINT

(Answering Point IV of the Petition, pp. 13-14)

Whether, and for how long and for what purposes, a dissolved corporation continues to have existence is determined by the law of the state of incorporation. In the case at bar the New York statute provides for the continued existence of the dissolved corporation, with the right to sue upon and enforce contracts entered into prior to dissolution, without limitation as to time. The issue as to the plaintiff's capacity to sue thus presents no question of Federal law, and was correctly decided below.

The question as to whether or not a dissolved corporation has the status to sue in the Federal courts after dis-

solution "concerns the fundamental law of the corporation enacted by the state which brought the corporation into being" (*Oklahoma Natural Gas Co.* v. *Oklahoma*, 273 U. S. 257, 260). In *Chicago T. & T. Co.* v. *Forty-one Thirty-six W. Corp.*, 302 U. S. 120, this Court once again affirmed the rule that the capacity of a dissolved corporation to sue in a Federal court is determined by the law of the state of incorporation.

The New York statute in the case at bar expressly provides that upon taking the statutory steps for dissolution, the corporation shall be dissolved and shall cease to carry on business "*except for the purpose of adjusting and winding up its business,*" and that after such dissolution "the said corporation by its board of directors shall proceed to adjust and wind up its business and affairs *with power to carry out its contracts*" and to do other usual and necessary things incidental to the winding up of its business and affairs. The foregoing provisions of subdivision 2 of the statute are reinforced by the provisions of subdivision 3, which are as follows:

> "Said corporation shall nevertheless continue in existence for the purpose of paying, satisfying and discharging any existing debts or obligations, collecting and distributing its assets and doing all other acts required in order to adjust and wind up its business and affairs, and may sue and be sued for the purpose of enforcing such debts or obligations, until its business and affairs are fully adjusted and wound up."

It is to be noted that the New York statute, unlike dissolution statutes of other states, has no limitation of time during which the dissolved corporation continues in existence and may sue and be sued. On the contrary, the statute continues the corporate existence and the right to sue and the liability to be sued until the corporation's "business and affairs are fully adjusted and wound up."

As said by the Circuit Court of Appeals herein, 115 Fed. (2d) at p. 271, if the defendant "did not perform the plaintiff could sue for the breach of the obligation under the clear words of the statute, even though it had voluntarily dissolved"; and the cases so hold (*City of New York* v. *New York South Brooklyn Ferry & Steam Transportation Co.*, 231 N. Y. 18; *Orr & Co., Inc.* v. *Firemen's Fund Ins. Co.*, 235 N. Y. App. Div. 1; *City Investment Co.* v. *Gerken*, 200 N. Y. App. Div. 503; *Brennan* v. *Barnes*, 133 N. Y. Misc. 340; *cf. Philadelphia* v. *Lieberman*, 112 Fed. (2d) 424, 428, cited by the Circuit Court of Appeals in its opinion herein).

In the *Orr* case, *supra*, (where even the dates correspond to those in the suit at bar), the plaintiff corporation was dissolved in 1919. The breach did not occur until 1928. Suit was not brought until 1929. The Court held:

> "The corporation is still in existence, this cause of action belongs to it. It is the proper party to prosecute the litigation as it has been continued in existence expressly for that purpose. (*Cunningham* v. *Glauber*, 133 App. Div. 10, 13; *Security Trust Co.* v. *Pritchard*, 201 id. 142, 147; *Brock* v. *Poor*, 216 N. Y. 387.) * * *"

The cases cited at p. 14 of the petition are wholly inapposite. *Kinney* v. *Reid Ice Cream Co.*, 57 N. Y. App. Div. 206, 209, did not involve the New York dissolution statute or any question as to the capacity of a dissolved New York corporation to sue, and the case holds only that a pleading which alleges that a foreign corporation has ceased to have existence before making the transfer in suit is not demurrable. The other cases cited at p. 14 of the petition hold only that partnerships, unincorporated associations, etc., are not "persons" or "citizens" under Federal law.

THIRD POINT

(Answering Point V of the Petition, pp. 14-15)

In respect of the proof of damages, the petition proceeds upon contentions contrary to the Record.

At pp. 4-5 of the petition, the impression is sought to be conveyed that the evidence offered by the plaintiff to prove its damages consisted solely of the census figures referred to at the said pages. The opinions of both the District Court and the Circuit Court of Appeals discuss fully the proof of damages made by the plaintiff upon the trial (Apt. App. 48-52; 115 Fed. (2d) at pp. 273-5). Such proof consisted of evidence of profits of the plaintiff's business prior to the making of the contract; evidence of the defendant's profits upon the unfilled orders which plaintiff turned over to it; evidence of the profit-earning capacity, the rates of profit, and the markets available for the exploitation of the articles which could be manufactured under the patents covered by the contract. There was also evidence of damage suffered by the plaintiff as a result of defendant's double-price policy of favoring its affiliated companies. It is everywhere the rule that such proof of damages is competent and adequate (*Palmer* v. *Connecticut R. & Light Co.*, ——— U. S. ———, L. Ed. Adv. Opinions, Vol. 85, p. 283, at p. 288, and cases therein cited).

It is further stated in the petition, at p. 4, that the proof with respect to the census figures was introduced by the plaintiff "over objection," and that such proof "was allowed over proper objection"—but it is nowhere pointed out in the petition that *the defendant had insistently opened the door to this line of examination* (Apt. App. 46, item "7"; *ibid*, 57; 115 Fed. (2d) at p. 274), so that its objections could avail it nothing.

Upon the trial, counsel for the defendant put a series of questions to the witness Hollister on cross examination, culminating in the following (Appellee's Appendix, pp. 19-20):

> "'XQ. Mr. Hollister, if I understand you aright, you were saying not only that the Klaxon Company should have made more profits than it did, so I am asking you how much more profit it should have made than it did'?"

Plaintiff's counsel objected to the question. Defendant's counsel argued (in the presence and hearing of the jury, Appellee's Appendix, 20, 22):

> "The nature of this suit made demand upon me that I ask that question. Whether that question is a proper question depends upon whether the damages which the suit in this case is asking from the defendant are not so speculative that it is not properly an issue for a court or jury. * * * And I press for a favorable ruling upon it for the reason that unless this witness can answer that, surely it is not a question to be submitted to the jury."

The defendant procured a favorable ruling and took the witness's answer.

Thereupon, on the redirect of the same witness, the plaintiff went into the same subject matter. The defendant now claims that it was error to allow Mr. Hollister to show that certain of his figures came from the census reports; but as to that, too, the defendant opened the door, insisting that Mr. Hollister show the basis for his computations and even saying that if the basis was shown, "I shall not object to it" (Apt. App. 86-90).

On the above state of the Record, the defendant is not in a position to complain of the admission of the proof in question. The courts below were correct in so holding;

to the authorities cited by the Circuit Court of Appeals in its opinion, we add the following: *Bogk* v. *Gassert*, 149 U. S. 17; *Bradley* v. *Adams Express Co.* (6th C. C. A.), 89 Fed. (2d) 641, 642-3; *Post Publishing Co.* v. *Hallam*, 59 Fed. 530; *Ward* v. *Blake Mfg. Co.*, 56 Fed. 437, 441; *Brady* v. *Kern*, 222 Fed. 873, 876; 2 *Jones Commentaries on Evidence* (2nd Ed.) § 721.

CONCLUSION

The case presents no question meriting the grant of *certiorari*. The petition should be denied.

Respectfully submitted,

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